IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
Re: Appeal to the Board of Patent Appeals and Interferences

Appellants:	Smith et al.	Examiner:	Elizabeth M. Cole
Serial Number:	10/706,809	Group Art Unit:	1794
Filed:	November 12, 2003	Customer Number:	22827
Confirmation No.:	6952	Deposit Account:	04-1403
Title:	"Laminates of Elastomeric and Non-Elastomeric Polyolefin Blend Materials"	Attorney Docket No.	KCX-62-DIV (13267.1)

1. ☐ **NOTICE OF APPEAL**: Pursuant to 37 CFR 41.31, Applicant hereby appeals to the Board of Appeals and interferences from the last decision of the Examiner.

2. ☐ **PRE-APPEAL BRIEF REQUEST FOR REVIEW**: Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request. This request is being filed with a Notice of Appeal. The review is requested for the reason(s) stated on the attached sheet(s) [No more than five (5) pages may be provided.]

3. ☒ **BRIEF** on appeal in this application pursuant to 37 CFR 41.37 is transmitted herewith (1 copy).

4. ☐ An **ORAL HEARING** is respectfully requested under 37 CFR 41.47 (due within two months after Examiner's Answer).

5. ☐ Reply Brief under 37 CFR 41.41(b) is transmitted herewith (1 copy).

6. ☐ "Small entity" verified statement filed: [ ] herewith [ ] previously.

7. **FEE CALCULATION:**

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PETITION is hereby made to extend the original due date of February 21, 2010, hereby made for an extension to cover the date this response is filed for which the requisite fee is enclosed (1 month $130; 2 months $490; 3 months $1,110; 4 months $1,730, 5 months $2,350 $ 130.00

SUBTOTAL: $ 670.00

Less any previous extension fee paid since above original due date. - $ 0.00

Less any previous fee paid for prior Notice of Appeal since Board did not render a decision on the merits. MPEP § 1204.01 - $ 0.00

Less any previous fee paid for submitting Brief on prior Appeal since Board did not render a decision on the merits. MPEP § 1204.01	-	$ 0.00
SUBTOTAL:		$ 670.00
If "small entity" verified statement filed ☐ previously, ☐ herewith, enter one-half (½) of subtotal and subtract	-	$ 0.00
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☐ Fee enclosed.

☐ Charge fee to our Deposit Account/Order Nos. in the heading hereof (for which purpose one additional copy of this sheet is attached)

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☐ Fee NOT required since paid in prior appeal in which the Board of Appeals did not render a decision on the merits.

The Commissioner is hereby authorized to charge any fee specifically authorized hereafter, or any fees in addition to the fee(s) filed, or asserted to be filed, or which should have been filed herewith or concerning any paper filed hereafter, and which may be required under Rules 16-18 (deficiency only) now or hereafter relative to this application and the resulting official document under Rule 20, or credit any overpayment, to our Account No. shown in the heading hereof. This statement does not authorize charge of the issue fee in this case.

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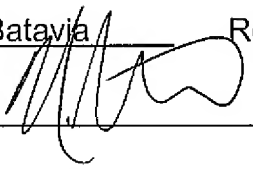
Signature: 

Date: March 22, 2010

I hereby certify that this correspondence and all attachments and any fee(s) are being electronically transmitted via the internet to the U.S. Patent and Trademark Office using the Electronic Patent Filing System on March 22, 2010 .

Heidi M. Lewis
(Typed or printed name of person transmitting documents)

Heidi M. Lewis
(Signature of person transmitting documents)

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF APPEALS AND INTERFERENCES

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BRIEF ON APPEAL

Commissioner for Patents
Post Office Box 1450
Alexandria, VA 22313-1450

Dear Sir:

Appellants submit the following brief on appeal in accordance with 37 C.F.R. § 41.37:

1. REAL PARTY IN INTEREST

The real party in interest in this matter is the assignee of record, Kimberly-Clark Worldwide, Inc.

2. RELATED APPEALS AND INTERFERENCES

There are no other appeals or interferences known to the Appellants or the Appellants' legal representative which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

3. STATUS OF CLAIMS

Claims 1-12 and 17-22 are pending in the application, including independent claims 1and 9. Claims 1-8 have been withdrawn. All of the claims are attached hereto in the Claims Appendix.

In the Final Office Action of September 28, 2009, claims 9-12 and 17-22 were finally rejected under 35 U.S.C. §103(a). The rejection of claims 9-12 and 17-22 is hereby appealed.

4. STATUS OF AMENDMENTS

To the Appellants' knowledge, all amendments have been entered into the record.

5. SUMMARY OF CLAIMED SUBJECT MATTER

Independent claim 9 is generally directed to an elastic nonwoven web. See, e.g., Para. [0034]. The web comprises fibers formed from a composition having a blend of two components wherein one of said two components comprises an elastomeric polyolefin having a density of about 0.865 g/cm^3 to about 0.889 g/cm^3 and a peak melting point range of about 49° C to about 85° C and the other of said two components comprises a nonelastomeric polyolefin having a density of at least 0.890 g/cm^3 and a melt index of at least 30. See, e.g., Paras. [0055], [0057], and [0060]. The elastomeric polyolefin component is present in said composition in an amount of from about 90% to about 50% and said nonelastomeric polyolefin component is present in said composition in an amount of from about 10% to about 25%. See, e.g., Paras. [0061] and [0096].

6. GROUNDS OF REJECTION TO BE REVIEWED ON APPEAL

In the Final Office Action, claims 9-12 and 17-22 stand rejected under 35 U.S.C. §103(a) as being unpatentable by U.S. Patent No. 4,722,972 to Yamaoka et al. in view of U.S. Patent No. 5,382,631 to Stehling et al.

7. ARGUMENT

Appellants respectfully submit that the presently pending claims are patentable over the cited reference.

I. Independent claim 9 is patentably distinct over U.S. Patent No. 4,722,972 to Yamaoka et al. in view of U.S. Patent No. 5,382,631 to Stehling et al.

The present application is directed to laminates of elastomeric and non-elastomeric polyolefin blend materials. While both polymeric blends of polyethylene and typical rubber-type elastomers and polymeric blends of various polymers and metallocene-catalyzed polyethylene are known in the art, the advantages arising from the unique combination of the present invention in the particular application as the elastic sheet(s) in various nonwoven laminates has not heretofore been recognized. It is an object of the present invention to provide a polymeric composition which exhibits elastomeric properties such as flexibility and extensibility. In that regard, all of the presently pending claims require an elastomeric polyolefin having a density of about 0.865 g/cm^3 to about 0.889 g/cm^3 and a peak melting point range of about 49° C to about 85° C.

A. Yamaoka et al., either alone or in any proper combination with Stehling et al. fails to teach or suggest certain limitations of independent claim 9.

In the Office Action, claims 9-22, including independent claim 9, were rejected under 35 U.S.C. § 103(a) as being unpatentable over Yamaoka et al. in view of Stehling et al. All of the presently pending claims require an elastomeric polyolefin having a density of about 0.865 g/cm^3 to about 0.889 g/cm^3 and a peak melting point range of about 49° C to about 85° C. It is respectfully submitted that the references cited, either alone or in any proper combination, fail to teach or suggest the presently pending claims.

For instance, Yamaoka et al. does not describe an elastomeric polyolefin having a density of about 0.865 g/cm^3 to about 0.889 g/cm^3. Rather, as noted in the Final Office Action, the examples of Yamaoka et al. describe an ethylene-propylene copolymer rubber having a density of 0.863 g/cm^3 or less, such as 0.862 g/cm^3. See Examples 1 and 7. Indeed, such examples are the only place where the density of the copolymer rubber of Yamaoka et al. is discussed at all. As such, it is respectfully submitted that Yamaoka et al. fails to teach or suggest certain limitations of the pending claims.

In response, the Final Office Action argues that "Yamaoka does not teach a criticality of the density or teach away from using a higher density." Page 3, September 28, 2009 Final Office Action. Point in fact, however, Yamaoka et al. simply does not describe the densities anywhere else in the application. As such, it would only be reasonable for one of ordinary skill in the art to look to the very limited discussion in the examples for ranges of the copolymer rubber described therein; there would be no other

place in the specification to look. Further, the Final Office Action indicates that "[s]ince the claims recite a range and use the term 'about', it would be reasonable to expect that a value which varied by 0.002 would have about the same properties as a polyolefin component having a density value within the claimed range and that such a value would be encompassed by the claimed range." Id. This position ignores the fact that the claimed elastomeric polyolefin density is from about 0.865 g/cm^3 to about 0.889 g/cm^3 and that 0.002 g/cm^3 is actually over 8% of the difference in the claimed range. As such, 0.002 g/cm^3 is a significant amount and an ethylene-propylene copolymer rubber density of 0.863 g/cm^3 or less, such as 0.862 g/cm^3, as described in Yamaoka et al., would not necessarily result in the same properties as the claimed elastomeric polyolefin density. Yamaoka et al. even discusses the difference in properties of a density less than .860 g/cm^3 versus a density of greater than 0.910 g/cm^3 in relation to the ethylene-α-olefin copolymer (so-called nonelastomeric polyolefin) and describes the resulting undesirable changes that will result in the lower of higher densities. It simply would not be "reasonable to expect" that the lower value described in Yamaoka et al. would have the same properties as the claimed range. Since Stehling et al. fails to remedy this deficiency, Appellants respectfully submit that pending independent claim 9 defines over the cited references.

B. Stehling et al. teaches away from combination with Yamaoka et al.

Furthermore, even if the rubber blend of Yamaoka et al. did disclose the claimed ranges, it would not have been obvious to one of ordinary skill in the art at the time of the invention to have employed the rubber blend of Yamaoka et al. to form nonwoven fabrics in view of Stehling et al. The Final Office Action acknowledges that "Yamaoka

differs from the claimed invention because it does not specify that the composition can be formed into nonwovens and does not disclose the claimed molecular weight distribution." Page 2, September 28, 2009 Final Office Action. However, Stehling et al. was combined with Yamaoka et al. for these limitations.

Stehling et al. describes that "in contrast to rubber blends" the "crystalline materials" described therein have "superior properties." Col. 2, line 59 – Col. 3, line 2. It was stated that the interpolymer blend components of Stehling et al. are "crystalline materials having high ethylene concentrations where the comonomer is randomly distributed along the polymer backbone chain." Id. In this manner, the random (non-tapered) molecules having high ethylene concentrations, and the blends of these components, are plastics rather than rubbers. Id. By sharp contrast, the soft segments of Yamaoka et al. are explicitly described as rubbers.

It is improper to combine references where the references teach away from their combination. In re Grasselli, 713 F.2d 731, 743, 218 USPQ 769, 779 (Fed. Cir. 1983). Here, Stehling et al. teaches away from non-crystalline rubber blends. Thus, Stehling et al. teaches away from combination with the rubber blend of Yamaoka et al.

Furthermore, to the extent that Yamaoka et al. could be said to discuss the use of crystalline polyolefins, it is only if the "desired" performance "is not impaired." Col. 7, lines 32-39. In this regard, Stehling et al. indicates crystalline polyolefins with melting points well outside of the claimed range as illustrated in Tables 7A and 7B which show melting points ranging from 99° C to 129° C. Thus, even though the Final Office Action claims that Yamaoka et al. describes a rubber blend having the claimed melting point range, it is reasonable to presume that use of crystalline polyolefins such as those

described in Stehling et al. would modify such range, especially considering that the crystalline polyolefins are described in Stehling et al. as having higher melting points than those claimed. It is respectfully submitted that one of ordinary skill in the art would not have modified Stehling et al. with Yamaoka et al. in the manner suggested in the Final Office Action. Therefore, it is respectfully submitted that the presently pending claims patentably define over the cited references.

In response, the Final Office Action argues that "to use the particular blend of Yamaoka for a purpose for which such blends are known would have been obvious to one of ordinary skill in the art." Page 4, April 30, 2009 Office Action. It was further stated that "it would have been obvious to have employed the polyethylene polymer blend of Yamaoka to form nonwovens, since such a use was conventionally known for polyethylenes." Page 4, September 28, 2009 Final Office Action.

However, this statement ignores the fact that Stehling et al. teaches away from non-crystalline rubber blends. As such, it would not have been obvious to one of ordinary skill in the art to utilize the material of Yamaoka et al. in a nonwoven fabric, particularly when the reference cited for the motivation of such a modification teaches away from the material utilized in Yamaoka et al.

II. Dependent claims 10-12 and 17-22 are patentably distinct over Yamaoka et al. in view Stehling et al.

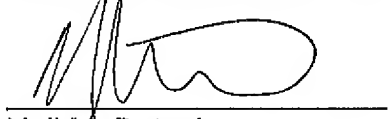
Presently pending dependent claims 10-12 and 17-22 should also be allowed over the combination Yamaoka et al. and Stehling et al., for at least the reasons discussed above with respect to independent claim 9. However, Appellants also note that the patentability of the dependent claims certainly does not hinge on the patentability of independent claim 9. In particular, it is believed that some or all of these

claims may possess features that are independently patentable, regardless of the patentability of independent claim 9.

For the reasons stated above, it is Appellants' position that the Examiner's rejection of claims has been shown to be untenable and should be **reversed** by the Board. Please charge any additional fees required by this Appeal Brief to Deposit Account No. 04-1403.

Respectfully submitted,

DORITY & MANNING, P.A.



March 22, 2010
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9. CLAIMS APPENDIX

1. (Withdrawn) A method of producing a composite nonwoven laminate comprising the steps of:

(a) providing an elastic sheet comprising a polymeric blend of an elastomeric polyolefin having a density of less than about 0.885 g/cm^3 and a nonelastomeric polyolefin having a density of at least about 0.890 g/cm^3;

(b) elongating said elastic sheet;

(c) joining the elongated elastic sheet to a gatherable polymeric web at spaced-apart locations; and

(d) relaxing said elongated elastic sheet so that the gatherable polymeric web is gathered at said spaced-apart locations.

2. (Withdrawn) The method of claim 1 wherein said elastomeric polyolefin comprises a narrow molecular weight distribution polyolefin.

3. (Withdrawn) The method of claim 2 wherein said narrow molecular weight distribution polyolefin is a narrow molecular weight distribution polyethylene.

4. (Withdrawn) The method of claim 1 further comprising the step of joining the elongated elastic sheet to an additional gatherable polymeric web at additional spaced-apart locations.

5. (Withdrawn) The method of claim 1 wherein said gatherable polymeric web comprises a coformed nonwoven web.

6. (Withdrawn) The method of claim 5 wherein said coformed nonwoven web comprises cellulosic fibers and polypropylene fibers.

7. (Withdrawn) The method of claim 4 wherein both said gatherable polymeric webs comprise coformed nonwoven webs.

8. (Withdrawn) The method of claim 7 wherein said coformed nonwoven webs comprise cellulosic fibers and polypropylene fibers.

9. (Rejected) An elastic nonwoven web comprising fibers formed from a composition having a blend of two components wherein one of said two components comprises an elastomeric polyolefin having a density of about 0.865 g/cm^3 to about 0.889 g/cm^3 and a peak melting point range of about 49° C to about 85° C and the other of said two components comprises a nonelastomeric polyolefin having a density of at least 0.890 g/cm^3 and a melt index of at least 30, wherein said elastomeric polyolefin component is present in said composition in an amount of from about 90% to about 50% and said nonelastomeric polyolefin component is present in said composition in an amount of from about 10% to about 25%.

10. (Rejected) The nonwoven web of claim 9 wherein said elastomeric polyolefin has a molecular weight distribution of less than about 3.5.

11. (Rejected) The nonwoven web of claim 9 wherein said elastomeric polyolefin is a polyethylene having a molecular weight distribution of less than about 3.5.

12. (Rejected) The nonwoven web of claim 11 wherein said nonelastomeric polyolefin is a polyethylene.

13-16. (Cancelled).

17. (Rejected) The nonwoven web of claim 9, wherein the elastomeric polyolefin component is present in the composition in an amount from about 80% to about 90% and the non-elastic polyolefin is present in the composition in an amount from about 10% to about 20%.

18. (Rejected) The nonwoven web of claim 9, wherein the nonwoven web comprises a meltblown web.

19. (Rejected) The nonwoven web of claim 9, wherein the nonwoven web comprises a spunbond web.

20. (Rejected) The nonwoven web of claim 9, wherein the fibers comprise substantially continuous filaments.

21. (Rejected) The nonwoven web of claim 20, wherein the substantially continuous filaments comprise an array of substantially continuous filaments.

22. (Rejected) the nonwoven web of claim 20, wherein the substantially continuous filaments comprise spunbond fibers.

10. EVIDENCE APPENDIX

None

11. RELATED PROCEEDINGS APPENDIX

None